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No. 91-995

In The

Supreme Court of the United States

October Term, 1991

ROBERT J. DEL TUFO, Attorney General of New Jersey and C. GREGORY STEWART, Director, New Jersey Department of Law and Public Safety, Division on Civil Rights,

Petitioners,

v.

THE IVY CLUB, a New Jersey Corporation,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITIONERS' REPLY BRIEF

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RESPONDENT'S BRIEF FOCUSES ON ISSUES WHOLLY IRRELEVANT TO THE IMPORTANT FEDERAL QUESTIONS RAISED BY THE THIRD CIRCUIT'S AUTHORIZATION OF DISTRICT COURT RELITIGATION OF FEDERAL ISSUES DECIDED BY A STATE ADMINISTRATIVE AGENCY ACTING IN A JUDICIAL CAPACITY

In its brief in opposition to the Petition, Respondent The Ivy Club ("Ivy") attempts to obfuscate the history of this matter – and the significant federal questions involved – by studiously downplaying the plain history of its voluntary litigation of the freedom of association issue (now to be relitigated in federal district court) from 1979 through 1986 before the New Jersey Division on Civil Rights ("Division"), reflecting the denigration by Ivy – and by the Third Circuit majority below – of the state administrative process. Contrary to Ivy's passing, derogatory reference to the Division's proceedings (*i.e.*, describing a 6,000 page record, primarily containing stipulations *agreed to by Ivy*, as having been " 'dumped' into the record by Sally Frank," Rb* at 2), the Division conducted a lengthy, fully adversarial proceeding pursuant to the New Jersey Administrative Procedure Act, *N.J.S.A. 52:14B-1 et seq.*, in which Ivy unreservedly argued (in pleadings and in a variety of briefs) its claim that the First Amendment right to associational privacy shielded the club from the reach of the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.* In its thirty-nine

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* "Rb" refers to the brief of Respondent Ivy.

page decision, the Supreme Court of New Jersey explicitly addressed these allegations by Ivy of purported procedural improprieties, and squarely held that the proceeding before the Division met due process requirements. *Frank v. Ivy Club*, 120 *N.J.* 73, 576 *A.*2d, 241 (N.J. 1990), *cert.* den. *sub nom., Tiger Inn v. Frank*, ___ *U.S.* ___, 111 *S.Ct.* 799, 112 *L.Ed.*2d 860 (1991) (Pet. App. E. at 77a-123a). Indeed, the Third Circuit below recognized that the New Jersey Supreme Court found the Division's proceeding to comport with due process, *Ivy Club v. Edwards*, 943 *F.*2d 270, 275 (3d Cir. 1991) (App. A at 7a), and pointedly did *not* base its authorization for relitigation of this matter on any alleged procedural deficiencies. *See also Williams v. Red Bank Board of Ed.*, 662 *F.*2d 1008, 1020-1022 (3d Cir. 1981) (New Jersey administrative hearings conducted pursuant to Administrative Procedure Act meet federal due process standards).

Rather than turning on any unique procedural problems, the essence of the decision below is centered on the Third Circuit's belief that "the administrative process is not sufficient to adjudicate such matters of federal law" as constitutional questions (Rb at 16). *See Ivy Club v. Edwards, supra*, 943 *F.*2d at 287 (App. A at 25a). As argued in the Petition, this authorization for district courts to ignore decisions of state administrative agencies acting in a judicial capacity (where, as in this case, state appellate review is *available*) could have severe, deleterious consequences, given the growing importance and utilization of the state administrative system in enforcing state laws. Allowing such relitigation of issues decided in a state administrative proceeding not only is contrary to the most basic principles of comity and federalism articulated

by this Court in *Younger v. Harris*, 401 *U.S.* 37 (1971) and its progeny, but also will result (as noted by the dissent below) in "repetitive, vexatious" litigation by parties such as Ivy who will "test their federal claims in state proceedings and if unsuccessful there, get a second chance in § 1983 actions in federal district courts." *Ivy Club v. Edwards, supra*, 943 *F.*2d at 291 (App. A at 50a) (Nygaard, U.S.C.J., dissenting). Petitioners respectfully submit that such denigration of the state administrative process conflicts with the rationale behind this Court's decisions in *University of Tennessee v. Elliot*, 478 *U.S.* 788 (1986), and *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 *U.S.* 619 (1986), and warrants this Court's review.

Ivy's discussion of *England v. Louisiana State Board of Medical Examiners*, 375 *U.S.* 411 (1964), similarly misses the important federal issue raised by the Third Circuit's expansion of *England*, insofar as a party's reservation of federal claims is recognized even where such party has freely submitted the federal issues for decision in the state forum. Thus, Ivy seeks to justify the Third Circuit ruling by asserting that it "never invoked the jurisdiction of the state agency" (Rb at 7). That Ivy was an "involuntary" participant in the State proceeding, presenting its federal claims "defensively," in no sense diminishes this Court's holding in *England* that *any party* which unreservedly submits its federal claims for decision by the state forum has foregone the right to return to federal court. *England v. Louisiana State Board of Medical Examiners, supra*, 375 *U.S.* at 419. While this proscription in *England* pertained to decisions by state *courts* on federal issues, there is simply no legal or logical basis to refrain from

applying the rationale to state *administrative* decisions on federal issues as well. In essence, the Court below has expanded *England* to permit relitigation of federal questions decided in a state forum, an expansion which, Petitioners respectfully submit, should not go unreviewed.*

Finally, Ivy's muddled discussion of preclusion (Rb at 11-13) reflects the artificial distinction in the decision below between the preclusive effect of fact-finding versus legal determinations of state administrative agencies acting in a judicial capacity. Remarkably, Ivy appears to cite *University of Tennessee v. Elliot, supra,* for the proposition that no preclusive effect can be given to the administrative fact-finding which the Division conducted on the federal issue presented by Ivy (Rb at 11). Of course, this is not the law under Elliot.** Nevertheless, Ivy's

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* In its discussion of the *England* question, Ivy also seeks to muddy the undisputed history of this matter by claiming that it "sought injunctive relief immediately upon the final decision of the state administrative agency on the question of jurisdiction" (Rb at 15). This "jurisdictional" question is simply another name for the federal constitutional issue involved in this matter, as Ivy and its federal co-plaintiff, Tiger Inn, argued that the First Amendment right to freedom of association prevented the Division from exercising its jurisdiction over Sally Frank's sex discrimination complaint. Only *after* receiving an adverse decision on this issue did Ivy and Tiger Inn initiate their federal action.

** Under New Jersey law, which controls the preclusion question under *Elliot*, determinations of an administrative agency are entitled to preclusive effect in New Jersey courts. *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Board of Higher Ed.*, 654 F.2d 868, 876, n. 12 (3d Cir. 1981).

misconstruction of *Elliot* is based on the confused treatment of that decision by the Third Circuit, which, while acknowledging the applicability of *Elliot* to the district court proceeding, permits Ivy to submit additional evidence on the constitutional issue despite the extensive fact-finding by the Division. *Ivy Club v. Edwards, supra,* 943 *F.*2d at 284 (App. A at 29a-30a). More importantly, Ivy's misreading of *Elliot* is based on the unworkability of the dichotomy in the decision below between administrative factual and legal determinations. Where a party such as Ivy affirmatively injects federal issues into a state administrative proceeding, there is no reason to grant preclusive effect *only* to the agency's factual determinations but not to its legal conclusions. The result of avoiding preclusion will be trials such as the instant matter which, after over a decade of state proceedings, will be litigated anew in district court.*

In short, Ivy fails to articulate any legitimate reasons why the Petition should not be granted. Ivy's brief is devoid of any argument justifying the Third Circuit's refusal to apply the proscription in *England* against relitigating federal issues presented and decided in a

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* It should be noted that Ivy (and Tiger Inn) are vigorously opposing pending summary judgment motions before the district court, submitting voluminous facts allegedly in dispute which the clubs contend necessitate a trial *de novo*. The clubs pointedly do *not* seek summary judgment themselves based on the fact-finding in the 11 year State proceeding. As Ivy candidly admits in its brief, Ivy anticipates a full-scale district court trial, with eventual review by this Court. *See* Rb at 15. As noted by Sally Frank, review by this Court is necessary to stop further abuse of the federal judiciary by parties which "create cases that never end." (Frank brief, p. 13.)

state proceeding. The brief is devoid of any argument as to why a federal district court in a 42 *U.S.C.* § 1983 action can ignore a state agency's legal determinations, where the agency acts in a judicial capacity and appellate review is available. Finally, the brief is devoid of any argument as to why the express finding by the Third Circuit that the prerequisites to *Younger* abstention existed in this matter should not have resulted in dismissal of the federal complaint.

For these reasons, as well as those contained in the Petition and in the brief of Sally Frank, Petitioners respectfully request that the Petition for Writ of *Certiorari* to the Court of Appeals for the Third Circuit be granted.

Respectfully submitted,

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